



Federal Communications Commission
Washington, D.C. 20554

February 19, 2009

DA 08-XXXX

In Reply Refer to:

1800B3-MFW

Released:

Mr. Timothy C. Cutforth
965 South Irving Street
Denver, CO 80219

In re: **KJME(AM), Fountain, CO**
Facility ID No. 135886

File No. BL-200800801BCY
Request for Special Temporary
Authorization (BSTA-20081211AAA)

Dear Mr. Cutforth:

This letter concerns: (1) the referenced application (the "Application") of Timothy C. Cutforth ("Cutforth") to cover the construction permit¹ for a new directional AM station KJME(AM) in Fountain, Colorado; and (2) the December 11, 2008, request for special temporary authorization (the "STA Request") to resume operations for the purpose of completing antenna proofs. For the reasons set forth below, we dismiss the Application as patently defective, dismiss the STA Request as moot, and declare the KJME(AM) construction permit expired.

Background. On June 4, 2001, Cutforth filed an application for a new AM station at Fountain, Colorado, on frequency 890 KHz, specifying 5.5 kW daytime power and 0.5 kW nighttime power, utilizing a directional antenna. The staff granted the uncontested application on July 28, 2005, specifying a construction permit expiration date of July 28, 2008. On December 31, 2007, Cutforth filed an application to modify the permitted facilities² (the "2007 Modification Application"), indicating that "land use changes since the filing of the original window proposal have made it necessary to change to a new tower site and design a new directional pattern."³ The staff granted the modification application on February 27, 2008.

Less than two months before the KJME(AM) construction permit was to expire, Cutforth filed another modification application (the "June 2008 Modification Application"),⁴ proposing operation with 5 kW daytime power and 0.64 kW nighttime power, requesting expedited processing. The staff granted the request and processed the June 2008 Modification Application, initially dismissing it on June 25, 2008, because of predicted nighttime interference in violation of Section 73.182 of the Commission's Rules⁵

¹ BNP-20010604ACD, as modified by BMP-20071231AAA and BMP-20080611ABU.

² File No. BMP- 20071231AAA.

³ 2007 Modification Application, Attachment 11, Engineering Statement at 1.

⁴ File No. BMP-20080611ABU.

⁵ 47 C.F.R. § 73.182.

(the “Rules”) with respect to, *inter alia*, Class B Station KVOZ(AM), Del Mar Hills, Texas, and a pending application⁶ for a new AM station in Anthony, Texas.⁷ Cutforth filed a Petition for Reconsideration on July 2, 2008, attaching an amendment correcting the identified defects, and the staff granted reconsideration, reinstated the June 2008 Modification Application *nunc pro tunc*, and granted that application, as amended, on July 7, 2008 (the “July 2008 Construction Permit”).⁸

The July 2008 Construction Permit specified a construction deadline of July 28, 2008. It also included the following conditions:

1. A license application (FCC Form 302) to cover this construction permit must be filed with the Commission pursuant to Section 73.3536 of the Rules before the permit expires on JULY 28, 2008.

2. A complete nondirectional proof of performance, in addition to a complete proof on the (day) directional antenna system, shall be submitted before program tests are authorized. The nondirectional and directional field strength measurements must be made under similar environmental conditions.

. . . .

6. Before program tests are authorized, sufficient data shall be submitted to show that adequate filters, traps and other equipment has been installed and adjusted to prevent interaction, intermodulation and/or generation of spurious radiation products which may be caused by common usage of the same antenna system by Stations KJME and KCEG (ID # 135885)⁹ and there shall be filed with the license application copies of a firm agreement entered into by the two stations involved clearly fixing the responsibility of each with regard to the installation and maintenance of such equipment. In addition, field observations shall be made to determine whether spurious emissions exist and any objectionable problems resulting therefrom shall be eliminated. Following construction, and prior to authorization of program test under this grant, BOTH stations shall each measure antenna or common point resistance and submit FCC Form 302 as application notifying the return to direct measurement of power.

On August 2, five days *after* the July 2008 Construction Permit expired, Cutforth filed the subject Application for covering license. The Application failed to comply with Conditions 2 and 6 on the construction permit, in that it did not contain the daytime full proof of performance or the other required exhibits. Accordingly, on November 13, 2008, the staff, pursuant to Section 73.3564 of the Rules,¹⁰ issued a deficiency letter to Cutforth identifying these defects and providing 30 days to file a curative

⁶ File No. BP-19850729AQ.

⁷ Letter to Timothy C. Cutforth, Reference 1800B2-JBS (MB Jun. 25, 2008).

⁸ Letter to Timothy C. Cutforth, Reference 1800B2-JBS (MB Jul. 7, 2008).

⁹ KCEG(AM), Fountain Colorado, also is owned by Cutforth. We are this date taking similar actions with respect to that Station.

¹⁰ 47 C.F.R. § 73.3564.

amendment.¹¹ Upon receipt of the deficiency letter, on December 11, 2008, Cutforth filed: (1) a letter requesting additional time to provide the documentation requested;¹² and (2) the STA Request seeking authority to operate the station with the permitted facilities for the purpose of conducting proof of performance field strength measurements.

Discussion. Section 73.3598(e) of the Rules states that any construction permit which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.¹³ Here, Cutforth filed the Application five days after the KJME(AM) permit expired. Moreover, the Application filed was patently defective in that it failed to supply the critical data necessary for evaluating the operation of the KJME(AM) directional antenna system.

Section 73.3566(a) of the Rules directs the staff to dismiss nonconforming applications.¹⁴ Consistent with this directive, the staff routinely dismisses defective applications,¹⁵ and the Commission has affirmed this practice.¹⁶ This rule makes clear that an applicant may not – as attempted by Cutforth in this case – “file a grossly defective and incomplete application as a mere placeholder and shift to the staff the full burden of ensuring the technical integrity and safety of allegedly constructed facilities.”¹⁷

Cutforth filed a seriously deficient application, omitting critical data necessary for evaluating the operation of the KJME(AM) directional antenna system. The filing of such a patently defective license application does not constitute the timely completion of station construction in accordance with the conditions set forth in the construction permit. To permit such filings would undermine the

¹¹ *Letter to Timothy C. Cutforth*, Reference 1800GB2-JBS (Nov. 13, 2008).

¹² *Letter to Marlene H. Dortch* (rec'd Dec. 11, 2008). In this letter, Cutforth requests an additional 209 days to complete the measurements for KJME (and, as required by Condition # 6, for KCEG(AM)). *Id.*, “Sequential Measurement Plan.” He indicated that he was issued construction permits for three AM stations (KJME(AM) and KCEG(AM), Fountain, Colorado, and KJL(AM), Pine Bluffs, Wyoming) and “ran short of time to document the operation of the facilities.” *Id.* at 3. He also describes the difficulty of doing the measurements, as access along “most of the radials” is “limited” due to terrain and the presence of adjacent military installations. *Id.* at 2.

¹³ 47 C.F.R. § 73.3598(e).

¹⁴ *See* 47 C.F.R. § 73.3566(a).

¹⁵ *See, e.g., KZTY(AM), Winchester, Nevada*, Letter (M.M. Bur. Dec. 21, 2000); *WWRU(AM), Jersey City, New Jersey*, Letter (M.M. Bur. Feb. 15, 2000); and *KAPM(AM), Bakersfield, California*, Letter (M.M. Bur. Oct. 29, 1999). Each of these cases involved a staff dismissal of a defective AM license application without an opportunity to amend. *See also Wauchula Educational Broadcasting Corp.*, Letter, DA 09-237, 24 FCC Rcd ____ (MB Feb. 13, 2009) (affirming dismissal of license application where low power FM applicant failed to file required proof of performance with the application).

¹⁶ *See, e.g., Bobby Duffy*, Memorandum Opinion and Order, 7 FCC Rcd 1734 (1992) (“the initial finding of acceptability is a provisional determination. When the Bureau later determined that Duffy’s application was not in compliance with Section 73.211 of the Commission’s Rules and was not supported by a grantable waiver request, the application could properly be dismissed.”) *See also Dasan Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 7550, 7551 (1992) n.3; and *Special Markets Media, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 5753, 5754 (1989) (Commission affirms dismissal of application, rejects applicant’s claim that it should have been given a chance to amend).

¹⁷ *Aerco Broadcasting Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 24417, 24419-20 (2003).

Commission's strict construction permit requirements.¹⁸ Accordingly, we find that the July 2008 Construction Permit has automatically expired.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED, that the application (File No. BL-20080801BCY) of Timothy C. Cutforth for covering license for Station KJME(AM) IS DISMISSED as patently defective pursuant to Section 73.3566(a) of the Commission's Rules. The construction permit (File No. BNP-20010604ACD, as modified by BMP-20071231AAA and BMP-20080611ABU) for Station KJME(FM), Fountain, Colorado, EXPIRED BY OPERATION OF LAW ON July 28, 2008, without further action by the Commission.

IT IS FURTHER ORDERED, that call sign KJME(AM) IS DELETED.

IT IS FURTHER ORDERED, that the December 11, 2008, request for Special Temporary Authorization (BSTA-20081211AAA) IS DISMISSED AS MOOT.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁸ We acknowledge there have been several instances in which the Bureau has waived Section 73.3598 and granted complete and acceptable license applications filed shortly after the permit expiration date, provided that the permittee had demonstrated timely construction in accordance with the terms of the permit. *See, e.g., Clear Channel Broadcasting Licenses, Inc.*, Letter, 21 FCC Rcd 8677 (MB 2006), *recon. dismissed in part and denied in part*, *Letter to Marissa G. Repp, Esq. and Frank R. Jazzo, Esq.*, 23 FCC Rcd 4526 (MB 2008). Here, however, Cutforth cannot demonstrate timely construction in accordance with the terms of the permit without supplying the exact information omitted from the Application.